UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**P-010** Commission Ruling Regarding Prosecution Motion for Additional 120-Day Continuance

1. This matter having come before the Military Commission upon government motion to grant a second 120-day continuance in this case until 17 September 2009;[1] and having considered the parties written submissions, to include the defense opposition;[2] and for good cause shown; the Military Commission finds that the interests of justice served by continuing further substantive proceedings to allow a review of the factual and legal bases for continued detention of the above named accused currently held at Guantanamo Bay, Cuba; to determine whether each can be transferred or released, or prosecuted for criminal conduct before a military commission or Article III court; or provided other lawful disposition consistent with the national security and foreign policy interests of the United States and the interests of justice,[3] outweigh the best interests of each accused and the general public in a prompt trial.

[1] On 21 January 2009, the Military Commission granted, over objection, a government motion to continue this case to 20 May 2009. *See* P-009, *Commission Ruling Regarding Government Motion for 120-Day Continuance*. On 14 May 2009, the government filed this supplemental motion requesting an additional 120-day delay.
[2] On 9 June 2009, Mr. Ali, proceeding in a *pro se* capacity, filed a response opposing the government's requested 120-day continuance. While filed out of time, the Military Commission finds good cause to consider the defense response. *See* Military Commissions Rule of Court (RC) 3.6.b.
[3] The President has tasked that the review with respect to those persons currently detained at Guantanamo Bay be completed on a "rolling basis and as promptly as possible". *See* Executive Order 13492 of January 22, 2009,

2. That said, while Messrs. Al Shibh and Al Hawsawi have indicated a desire to proceed *pro se*,[4] their detailed military defense counsel have raised questions regarding their competency to stand trial. As such, the Military Commission cannot resolve the representation issue until an incompetence determination hearing is held pursuant to Rule for Military Commission (RMC) 909(e).[5]

3. While a halt to all substantive pretrial and trial proceedings pending inter-agency review of this case is warranted, deferring discovery obligations related to a competency determination, appears not. Specifically, the government has not demonstrated to the Military Commission's satisfaction why the underlying medical examinations and other investigation which must be completed prior to conducting the above referenced incompetence determination hearings cannot proceed during this period. In addition, postponing further discovery in this case required to resolve the outstanding competency questions until after 17 September 2009 will likely result in delaying the incompetence determination hearings themselves, constituting an unjustified hardship to Messrs. Al Shibh and Al Hawsawi and affecting all five accused and the general public's right to a prompt trial. As such, the Military Commission directs the government

---

"Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities".

[4] *Pro se* legal representation refers to the circumstance of a person representing himself or herself without a lawyer in a court proceeding. *Pro se* is a Latin phrase meaning "for oneself".

[5] RMC 909 provides, in pertinent part, that, after referral of charges, the military judge may conduct a hearing to determine the mental capacity of the accused. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent

to comply with its discovery obligations under the Manual for Military Commissions and take all steps necessary to complete medical examinations and reports such that the RMC 909 incompetence determination hearings for Messrs. Al Shibh and Al Hawsawi can proceed on or about 21-25 September 2009.

4. Accordingly, the government's motion is GRANTED. Except as provided in paragraph 5 below, all military commission sessions are continued to no earlier than 17 September 2009.

5. A session pursuant to RMC 803[6] is scheduled for 16 July 2009 in Guantanamo Bay, Cuba where the Military Commission will conduct a status conference to address any unresolved discovery matters related to the incompetence determination hearings for Messrs. Al Shibh and Al Hawsawi. While Messrs. Sheikh Mohammed, Bin 'Attash and Ali may attend, the Military Commission will hear only from the prosecution and detailed military defense counsel for Messrs. Al Shibh and Al Hawsawi and only as to issues related to the RMC 909 hearing. No other matters will be addressed at this session. Motions, if any, related to the RMC 909 hearings should be filed by 1200 (EDT) 25 June 2009, responses by 1200 (EDT) 2 July 2009 and replies by 1200 (EDT) 7 July 2009. Absent good cause shown for continued delay, said incompetence determination hearings are scheduled for 21-25 September 2009.

---

to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of his case.

6. The Military Commission directs that a copy of this order be served upon each accused, the prosecution and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The underlying government motion, and Mr. Ali's response, will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above named accused.

So Ordered this 11th Day of June 2009:

/s/
Stephen R. Henley
Colonel, U.S. Army
Military Judge

[6] A military judge may call the Commission into session without the presence of the members to dispose of interlocutory matters and hear motions. *See* Discussion to RMC 803.

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
	)	
v.	)	**Prosecution Motion for Additional 120 Day Continuance in the Interests of Justice**
	)	
	)	
	)	
	)	
KHALID SHEIKH MOHAMMED,	)	
WALID MUHAMMAD SALIH MUBARAK BIN ATTASH,	)	
RAMZI BINALSHIBH,	)	
ALI ABDUL AZIZ ALI,	)	
MUSTAFA AHMED ADAM AL HAWSAWI	)	
	)	**14 May 2009**

1. **Timeliness**: This motion is timely filed.

2. **Relief Requested**: In the interests of justice, the Prosecution respectfully requests the Military Commission grant an additional 120-day continuance of the proceedings in the above-captioned case, until 17 September 2009.[1]

3. **Overview**: A second continuance is in the interests of justice, and, given the circumstances, outweighs the interests of both the public and the accused. On 22 January 2009, the President ordered comprehensive reviews of detention policy (including military commissions), and of all the individual detainees at Guantanamo (including the five accused in this military commissions case). Those reviews are not yet complete, but significant progress has been made. The President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo (Attachment G). As a first step, and as a result of the Detention Policy Task Force's initial work, on 15 May 2009 the Secretary of Defense published and notified Congress of five significant proposed changes to the Manual for Military Commissions (Attachment D), including rules that would exclude all statements obtained by the use of cruel, inhuman or degrading treatment, impose additional conditions on the use of hearsay, and provide the accused greater latitude in the selection of counsel. As required by law, however, proposed modifications to the procedures in effect in military commissions cannot take effect for 60 days from 15 May 2009. The Administration is committed to taking further steps to ensure that commissions are part of an overall system that best protects U.S. national security and foreign policy interests while also insisting that justice is done in the case of every single detainee. These steps will include working with the Congress now

[1] The Prosecution is seeking similar 120 day continuances in the other pending military commissions cases.

and in the future to reform our military commissions system to better serve those purposes. The Administration will shortly be proposing legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, not only to make the five rule changes noted above statutory, but also to make other significant changes to the commissions, including revising the rules governing classified evidence and further revising the rules regarding the admissibility of evidence. We anticipate that these changes will nevertheless permit cases pending before commissions to proceed, though no decisions have yet been made as to which specific detainees will continue to be prosecuted before commissions or whether they might be prosecuted in Article III courts, or whether some alternative disposition of the detainees might be recommended. Given all this, the Prosecution submits that the interests of the public and the accused would best be served by granting the continuance in this case.

4. **Burden and Persuasion**: As the moving party, the Prosecution bears the burden of persuasion. Rule for Military Commissions (R.M.C.) 905(c), Manual for Military Commission (MMC), 2007.

5. **Facts**:

a. On 22 January 2009, the President issued Executive Order (E.O.) 13492, "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities" (Attachment A). *See* 74 Fed. Reg. 4897 (Jan. 27, 2009). This E.O. directed an inter-agency review of "the status of each individual currently detained at Guantanamo." E.O. 13492, §4(a). The review participants[2] were tasked, first, to "determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantanamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States," and second, in the cases of those individuals not approved for release or transfer, "to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution . . ." *Id.* at §4(c)(2)-(3).

b. E.O. 13492 also directed the Secretary of Defense to "ensure that during the pendency of the Review . . . all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered. . . are halted." *Id.*, § 7 (emphasis added).

c. On 22 January 2009, the President also issued E.O. 13493, "Review of Detention Policy Options" (Attachment B). *See* 74 Fed. Reg. 4901 (Jan. 27, 2009). E.O. 13493 established a Detention Policy Task Force co-chaired by the Attorney General and

[2] E.O. 13492 directed that the following officers participate in the review: The Attorney General, the Secretaries of Defense, State, and Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and such other officers or employees of the United States as determined by the Attorney General. E.O. 13492, §4(b).

the Secretary of Defense, "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." E.O.13493, § 1(e) The E.O. directs that this Task Force complete its work in 180 days (i.e. by 21 July 2009). *Id.* at §1(d).

d. Consistent with the President's order that steps be taken sufficient to halt military commissions during the pendency of the review, the Secretary of Defense ordered that no new charges be sworn or referred to commissions, and directed the Chief Prosecutor of the Office of Military Commissions to seek continuances of 120 days in all cases that had been referred to military commissions (Attachment C).

e. In accord with that direction, on 20 January 2009, the Prosecution sought a continuance in the above-captioned case until 20 May 2009, which the court granted on 21 January 2009.

f. In compliance with E.O. 13492, the Detainee Review Task Force is actively considering detainees' cases. It has made recommendations resulting in decisions to transfer or release more than 30 individuals. The status of the accused in the above-captioned case is under active consideration by one of the Task Force's Detainee Review Teams, which will make a recommendation on the disposition of the accused to the principals appointed by the President pursuant to E.O. 13492 (Attachment A). Under E.O. 13492, the Secretary of Defense must ensure that these proceedings are halted at least until that review is complete.

g. Further, as a result of the initial work of the Detention Policy Task Force, the Secretary of Defense has published five proposed changes to the Manual for Military Commissions (Attachment D):

(1) Delete R.M.C. 202(b), MMC 2007, eliminating the dispositive effect, for purposes of jurisdiction for trial by a military commission under the M.C.A., of a prior determination by a Combatant Status Review Tribunal (or other competent tribunal) that an individual is an "unlawful enemy combatant."

(2) Revise R.M.C. 506, MMC 2007, to establish a right to "individual military counsel" of the accused's own choosing, provided the requested counsel is assigned as a defense counsel within the Office of the Chief Defense Counsel and is "reasonably available."

(3) Remove the language in the "Discussion" under Military Commission Rule of Evidence (M.C.R.E.) 301, MMC 2007, that directs the military judge to instruct the members they should consider the fact the accused did not subject himself to cross-examination when he offers his own hearsay statement at trial but does not testify.

(4) Prohibit the use of statements obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained. This would be accomplished by removing the distinction, in the standard for admissibility, between statements obtained before 30 December 2005 and those obtained on or after that date – which now potentially permits the admission of statements obtained by the use of cruel, inhuman or degrading treatment prior to 30 December 2005 – and applying the standard currently in M.C.R.E. 304(c)(2), MMC 2007, to all statements.

(5) Revise M.C.R.E. 803(c), MMC 2007 to give the proponent of hearsay that is not otherwise admissible under M.C.R.E. 803(a) the burden of demonstrating that a reasonable commission member could find the evidence sufficiently reliable under the totality of the circumstances to have probative value.

h. Pursuant to Section 949a(d) of Title 10, United States Code, the Secretary of Defense must inform the Committees on Armed Services of both the House and Senate of proposed modifications to the procedures in effect for military commissions at least 60 days before they go into effect.

i. The Secretary communicated these changes to the Armed Services Committees on 15 May 2009, and they are scheduled to go into effect on 14 July 2009.

j. The Administration also is working with the Congress on legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366 in order to codify these rule changes and to further change the law governing military commissions. Other significant changes being considered are revisions to the rules governing the use of classified information, further revisions of the rules concerning the admissibility of evidence, and adjustments to the class of individuals subject to the jurisdiction of the commissions.

k. In short, the interagency teams are actively engaged in a thorough assessment of all the issues directed for review by the President. However, at this point that work is not complete and, while much has been accomplished, the Prosecution does not know at this time precisely how the military commissions will be reformed, or even what the disposition of these five accused will be, including whether they will be tried by military commission. As stated before, the review of these individuals is not complete, and the 180-day Detention Policy Review is not due to be completed until July 21, 2009.

6. **Argument**:

a. Rule for Military Commissions (RMC) 707(b)(4)(E)(i) authorizes the military judge of a military commission to grant a continuance of the proceedings if the interests of justice are served by such action and outweigh the best interests of both the public and the accused in a prompt trial of the accused. For all of the reasons stated above, the Prosecution submits that it would best serve the interests of justice and the accused to grant the motion for continuance.

b. The requested continuance is in the interests of justice, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the military commissions process as a whole.

c. The interests of justice served by granting the continuance outweigh the interests of both the public and the accused. Granting a continuance of the proceedings is in the interests of the accused and the public, as the Administration's review of the commissions process and its pending cases might result in changes that would (1) necessitate re-litigation of issues in this case; or (2) if the case were to proceed at some later date, produce legal consequences affecting the options available to the Administration and the accused. It would be inefficient and potentially unjust to deny the continuance motion in this case before there is a final decision to proceed with this military commission—a commission that would, if resumed, proceed under a new set of rules.

d. Extending the continuance in this case for an additional 120 days, from 20 May until 17 September 2009, will permit adequate time for the Administration to complete its review of the military commissions process and of the pending cases, to take appropriate actions to implement the five rules changes noted above, and to work with the Congress to further revise and reform the commissions process to ensure that it best serves the national security and foreign policy interests of the United States and the interests of justice. The reason for seeking the requested delay, therefore, is consistent with the interests of justice, as it is intended to ensure the President has the time and opportunity to complete the policy and case-by-case reviews and to propose and implement changes to military commissions law and procedure, some of which will be best effected by legislation. In these circumstances, the additional delay of 120 days is not prejudicial to the accused nor is it inconsistent with the interests of the public.

7. **Scope of Request:**

a. Questions have arisen concerning the scope and effect of continuances that the Prosecution has sought and that the military judges have granted in commissions cases. The Executive Order directs the Secretary to take steps "sufficient to halt the proceedings," and it was in accord with that obligation that the Secretary directed the Chief Prosecutor to seek the continuances that are now in place.[3]

[3] The Prosecution's previous motion requesting a continuance did not attempt to define the scope of the requested continuance. However, in the instant case, the military judge did issue a ruling in which he assumed the prosecutors had not sought—and that he himself had not ordered "a 'halt' to any and all actions related to this case, but merely on the record hearings with counsel, the accused, and the military judge. The military judge correctly concluded that his ruling was consistent with the Prosecution's request and his earlier grant of a continuance, because "[s]ince recessing on 21 January 2009, the military judge has not called the Military Commission *into session*." Order on Defense Motion for Special Relief, *United States v. Mohammed, et al* (Mar. 18, 2009) (emphasis added). *See* R.M.C. 905(h) (providing that the military judge may dispose of written motions without a session of the commission). The Prosecution agrees with the military judge in that it did not then, and does not now, seek a halt to any and all actions related to the case.

b. The United States wishes to clarify the scope of the continuances that it now seeks. The Prosecution does not seek to preclude the parties from submitting any filings, if they wish. The purpose of this motion is, in effect, to preserve the status quo as it existed on January 22, 2009, and as it exists on this date, and to preclude any unnecessary judicial decisions on contested questions until the President decides whether and on what terms, and as to which accused, the military commissions will resume. For that reason, the Prosecution is asking the commission not to take any actions in the case—whether or not any "sessions" of court are involved—with the exception of any rulings the court must make (including a ruling on the instant motion itself) in order to preserve the status quo as of this date to the greatest practicable extent.

8. **Conclusion**: For the foregoing reasons, the military judge should extend the previously granted continuance of further proceedings until 17 September 2009, and adopt the attached Findings of Fact, Conclusions of Law and Order as part of his ruling. (Attachment E).

9. **Oral Argument**: The Prosecution does not request oral argument, but is prepared to argue should the commission find it necessary.

10. **Witnesses and Evidence**: No witnesses. The Prosecution respectfully requests the commission to consider the attachments to this motion as evidence of the asserted facts.

11. **Certificate of Conference**: The Prosecution has conferred with detailed military defense counsel for Mustafa al Hawsawi, who indicated that he did not object and would not ask for a hearing on the matter. The Prosecution has conferred with detailed military defense counsel for Ramzi bin al Shibh, who acknowledged the conference but took no position on the Prosecution's requested relief. As Khalid Sheikh Mohammed, Walid bin Attash and Ali Abdul Aziz Ali are currently proceeding pro-se and are being detained in Guantanamo Bay, Cuba, the Prosecution has not conferred with these individuals on this motion.

12. **Attachments**:

A. Executive Order 13492, 74 Fed. Reg. 4897 (Jan. 27, 2009)
B. Executive Order 13493, 74 Fed. Reg 4901 (Jan. 27, 2009)
C. Secretary of Defense Order dated 20 January 2009.
D. Amendments to Manual for Military Commissions, 2007
E. Proposed Findings of Fact and Conclusions of Law
F. Declaration of Mr. Matthew Olsen
G. Declaration of Mr. Bradford Wiegmann and Colonel Mark Martins.

13. **Respectfully Submitted by:**

By: /S/ .
Clay Trivett
Prosecutor

Presidential Documents

Executive Order 13492 of January 22, 2009

Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. *Definitions.* As used in this order:

(a) ''Common Article 3'' means Article 3 of each of the Geneva Conventions.

(b) ''Geneva Conventions'' means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(c) ''Individuals currently detained at Guantánamo'' and ''individuals covered by this order'' mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. *Findings.*

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals

have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109–366, as well as of the military commission process more generally.

Sec. 3. *Closure of Detention Facilities at Guantánamo.* The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. *Immediate Review of All Guantánamo Detentions.*

(a) **Scope and Timing of Review.** A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) **Review Participants.** The Review shall be conducted with the full cooperation and participation of the following officials:

(1) the Attorney General, who shall coordinate the Review;

(2) the Secretary of Defense;

(3) the Secretary of State;

(4) the Secretary of Homeland Security;

(5) the Director of National Intelligence;

(6) the Chairman of the Joint Chiefs of Staff; and

(7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) **Operation of Review.** The duties of the Review participants shall include the following:

(1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. *Diplomatic Efforts.* The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. *Humane Standards of Confinement.* No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. *Military Commissions.* The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. *General Provisions.*

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 22, 2009.

[FR Doc. E9–1893
Filed 1–26–09; 11:15 am]
Billing code 3195–W9–P

Presidential Documents

Executive Order 13493 of January 22, 2009

Review of Detention Policy Options

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. *Special Interagency Task Force on Detainee Disposition.*

(a) **Establishment of Special Interagency Task Force.** There shall be established a Special Task Force on Detainee Disposition (Special Task Force) to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.

(b) **Membership.** The Special Task Force shall consist of the following members, or their designees:

(i) the Attorney General, who shall serve as Co-Chair;

(ii) the Secretary of Defense, who shall serve as Co-Chair;

(iii) the Secretary of State;

(iv) the Secretary of Homeland Security;

(v) the Director of National Intelligence;

(vi) the Director of the Central Intelligence Agency;

(vii) the Chairman of the Joint Chiefs of Staff; and

(viii) other officers or full-time or permanent part-time employees of the United States, as determined by either of the Co-Chairs, with the concurrence of the head of the department or agency concerned.

(c) **Staff.** Either Co-Chair may designate officers and employees within their respective departments to serve as staff to support the Special Task Force. At the request of the Co-Chairs, officers and employees from other departments or agencies may serve on the Special Task Force with the concurrence of the heads of the departments or agencies that employ such individuals. Such staff must be officers or full-time or permanent part-time employees of the United States. The Co-Chairs shall jointly select an officer or employee of the Department of Justice or Department of Defense to serve as the Executive Secretary of the Special Task Force.

(d) **Operation.** The Co-Chairs shall convene meetings of the Special Task Force, determine its agenda, and direct its work. The Co-Chairs may establish and direct subgroups of the Special Task Force, consisting exclusively of members of the Special Task Force, to deal with particular subjects.

(e) **Mission.** The mission of the Special Task Force shall be to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.

(f) **Administration.** The Special Task Force shall be established for administrative purposes within the Department of Justice, and the Department of Justice shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support and funding for the Special Task Force.

(g) **Report.** The Special Task Force shall provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, on the matters set forth in subsection (d) within 180 days of the date of this order unless the Co-Chairs determine that an extension is necessary, and shall provide periodic preliminary reports during those 180 days.

(h) **Termination.** The Co-Chairs shall terminate the Special Task Force upon the completion of its duties.

Sec. 2. *General Provisions.*

(a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 22, 2009.

[FR Doc. E9–1895
Filed 1–26–09; 11:15 am]
Billing code 3195–W9–P

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JAN 20 2009

MEMORANDUM FOR THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS
CHIEF PROSECUTOR, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Military Commissions

Pursuant to the Military Commissions Act of 2006 and the authority vested in me as the Secretary of Defense, I hereby direct the Convening Authority for Military Commissions to cease referring cases to military commissions immediately. I direct the Chief Prosecutor of the Office of Military Commissions (OMC) to cease swearing charges, to seek continuances for 120 days in any cases that have already been referred to military commissions, and to petition the Court of Military Commission Review to hold in abeyance any pending appeals for 120 days.

This is to provide the Administration sufficient time to conduct a review of detainees currently held at Guantanamo, to evaluate the cases of detainees not approved for release or transfer to determine whether prosecution may be warranted for any offenses these detainees may have committed, and to determine which forum best suits any future prosecution.

This order does not preclude continued investigation or evaluation of cases by the OMC.

cc:
General Counsel of the Department of Defense
Chief Judge, Military Commissions Trial Judiciary
Chief Defense Counsel, Office of Military Commissions

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

ACTION MEMO

GENERAL COUNSEL

13 May 2009

FOR: THE SECRETARY OF DEFENSE

FROM: Jeh C. Johnson, General Counsel

SUBJECT: Changes to the Manual for Military Commissions

- Pursuant to Executive Order, the interagency Task Force on Detention Policy has developed five rules changes for the Manual for Military Commissions ("MMC").
- The Military Commissions Act of 2006 ("MCA") provides that the Secretary of Defense may modify the MMC, and shall submit a report to the Senate Armed Services Committee ("SASC") and the House Armed Services Committee ("HASC") describing such modifications not later than 60 days before the date on which they are to go into effect.
- Modification of the MMC, via these five rules changes, does not, in and of itself, entail any commitment to employ military commissions for the trial of any detainees; it simply improves the process in the event that commissions are subsequently used.
- In the pending military commissions cases, the current 120-day continuance expires on 20 May. It is important that trial counsel make their motions for a second continuance in the nine referred cases today, if at all possible. Doing so should allow enough time for the defense to respond and for the military judges presiding over these cases to rule on the motions. The grounds for a continuance will be much firmer if trial counsel can argue that Congress has been notified of these five rules changes, but that the changes cannot go into effect for 60 days. (If the motions for continuance are denied, we will have to withdraw the referred cases to comply with the terms of the Executive Order.)
- Attached to this memorandum are the five proposed MMC rules changes (TAB A). Those proposed rules changes and the reasons for making them are summarized as follows:
    - Rule for Military Commission ("R.M.C.") 202. The findings of the Combatant Status Review Tribunals are, in practice, insufficient to establish the factual predicate for jurisdiction of military commissions. The requisite finding is thus currently made by military judges at military commissions. The change to R.M.C. 202 is proposed to codify the existing practice for determining jurisdiction that is being utilized by

military commission judges to make findings sufficient to establish jurisdiction.

- R.M.C. 301(e). An accused may voluntarily introduce his or her own prior hearsay statements and exercise his or her right not to testify and be subject to cross-examination. In such circumstances, the Discussion section following R.M.C. 301 currently requires the military judge to instruct panel members that they may consider the fact that the accused chose to avoid cross-examination, and that his or her prior statements are not sworn, when determining the weight to accord to his or her prior hearsay statements. Removing the Discussion section for R.M.C. 301 eliminates an instruction that is widely viewed as unfairly detrimental to the accused.

- Military Commission Rule of Evidence ("M.C.R.E.") 304(c). Currently, statements made before December 30, 2005, may be admitted even if the interrogation methods used to obtain those statements amount to cruel, inhuman, or degrading treatment as defined by the Detainee Treatment Act. The proposed rule change would eliminate the difference in the criteria for the admissibility of statements made before and after December 30, 2005. As amended, M.C.R.E. 304(c) would provide that in all cases where the degree of coercion used to obtain a statement is disputed, a military judge may admit the statement only if he or she finds that it was not obtained using interrogation methods that constitute cruel, inhuman, or degrading treatment (and if the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence).

- R.M.C. 506. Changing R.M.C. 506 to allow an accused to select a military defense counsel of his or her choosing brings military commissions practice more in line with courts-martial practice and gives the accused greater latitude in making personal defense choices.

- M.C.R.E. 803(c). Reversing the burden of proof in M.C.R.E. 803(c) takes the burden of disproving reliability away from the opponent of the hearsay evidence, and returns the burden of proving reliability to the proponent. This is generally the norm in U.S. Courts, including courts-martial.

- Each of these changes can be accomplished without new legislation. The changes will enhance protections for the accused and bring military commissions practice more in line with courts-martial practice. Furthermore, these rules changes are based on the experience gained through application of the existing rules over the

last two years, and each will serve to support full and fair military commission trials. I have been directly involved in the development of these rules changes, and I am available to brief you on these if necessary.

- These five changes represent extensive work by the interagency Task Force on Detention Policy, which includes representatives from the Department of Defense, both uniformed and civilian, the Department of Justice, and other Executive Branch departments and agencies. All representatives concurred in the appropriateness of these changes, and during a meeting held on May 7, 2009, the Principals Committee reached a consensus to recommend these changes to the President. The President has now approved the course of action requiring adoption of these rules changes.
- DoD, DOJ and the White House have also determined to formulate legislative changes to the MCA, and we are working on that project now.

RECOMMENDATION: I recommend that you approve notice of these rules changes by initialing below. If you approve of the attached rules changes, I recommend you sign the attached letters (TAB B) formally reporting to the SASC and the HASC these changes as required by the MCA.

Approve RG Disapprove_____ Other_____

COORDINATION: TAB D

Attachments:
As stated
Sample Motion for Continuance (Tab C)

In brief, the changes are:

1. Remove references to the Combatant Status Review Tribunal within Rule for Military Commission 202 and specify that a commission is a "competent tribunal" for purposes of determining the jurisdictional predicate;

2. Remove the discussion section within Military Commission Rule of Evidence 301, which directs the military judge to instruct commission members to consider that the accused did not subject himself to cross-examination if the accused introduces his own hearsay statements at trial but does not testify;

3. Modify Military Commission Rule of Evidence 304 to render inadmissible all evidence the judge deems to have been secured as a result of cruel, inhuman, or degrading treatment within the meaning of the Detainee Treatment Act;

4. Provide for a right of individual military counsel in Rule for Military Commissions 506, permitting a right to counsel of choice within the office of the Chief Defense Counsel;

5. Modify Military Commission Rule of Evidence 803(c) to reverse the burden of proof regarding hearsay statements from a requirement that the opponent establish unreliability to a requirement that the proponent establish reliability.

1. *Remove references to the Combatant Status Review Tribunal within Rule for Military Commission 202.*

Rule for Military Commissions (R.M.C.) 202 currently states that a finding by a Combatant Status Review Tribunal ("CSRT") or by another "competent tribunal" is dispositive for purposes of jurisdiction for trial by military commission, as provided in 10 U.S.C. § 948d. In practice, however, CSRTs determine whether an individual is an "enemy combatant," not whether an individual is an "unlawful enemy combatant." In the military commission case against Salim Ahmed Hamdan, the military judge decided that the CSRT's findings were insufficient to establish jurisdiction, because the CSRT decided enemy combatant status, not unlawful enemy combatant status. The commission made its own determination that Hamdan was an "unlawful enemy combatant," thereby satisfying the jurisdictional predicate required by the MCA. In doing so, it concluded that the commission was an "other competent tribunal established under the authority of the President or the Secretary of Defense," the finding of which as to unlawful enemy combatant status is dispositive for purposes of jurisdiction under 10 U.S.C. § 948d and R.M.C. 202. This proposed rule modification would eliminate the rule text that provides that a CSRT determination of "unlawful enemy combatant" status is dispositive for jurisdictional purposes and would establish that a military commission is a "competent tribunal" to determine that the accused is an unlawful enemy combatant and thus subject to commission jurisdiction.

R.M.C. 202(b) would, therefore, read as follows (the areas crossed through would be deleted; areas underlined would be added):

Rule 202. Persons subject to the jurisdiction of the military commissions

(a) *In general.* The military commissions may try any person when authorized to do so under the M.C.A.

(b) *Competent Tribunal.* A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

~~(b) *Determination of unlawful enemy combatant status by Combatant Status Review Tribunal or other competent tribunal dispositive.* A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A. The determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals.~~

Discussion

Military commissions have personal jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. A military commission is a competent tribunal to make a finding sufficient for jurisdiction. *See* 10 U.S.C. § 948a(1)(ii) and § 948d(c).~~The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the Combatant Status Review Tribunal ("C.S.R.T.") process to determine an individual's combatant status. The C.S.R.T. process includes a right of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because the C.S.R.T. process provides detainees with the opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of the personal jurisdiction of a military commission. The M.C.A. provides that an individual is deemed an unlawful enemy combatant for purposes of the personal jurisdiction of a military commission if the individual has been determined to be an unlawful enemy combatant by a C.S.R.T. or other competent tribunal. Where combatant status of the accused may otherwise be relevant, the parties may establish the accused's status by evidence adduced in accordance with the commission rules. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government's obligation to prove beyond a reasonable doubt the elements of each substantive offense charged under the M.C.A. and this Manual.~~

~~*Combatant Status Review Tribunal.* The M.C.A. provides that an alien determined to be an unlawful enemy combatant by a C.S.R.T. shall be subject to military commission jurisdiction, whether the C.S.R.T. determined was made "before, on, or after the date of the enactment" of the M.C.A. *See* 10 U.S.C. § 948a(1)(ii). At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an "enemy combatant" if he "was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners." The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.~~

~~*Other Competent Tribunal.* The M.C.A. also provides that an individual shall be deemed an "unlawful enemy combatant" if he has been so determined by a competent tribunal established consistent with the law of war. *See* 10 U.S.C. § 948a(1)(ii).~~

~~The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.~~

(c) *Procedure.* The jurisdiction of a military commission over an individual attaches upon the swearing of charges.

2. *Remove the discussion section within Military Commission Rule of Evidence 301 that directs the military judge to instruct members to be wary of hearsay statements offered by an accused who does not testify.*

Military Commission Rule of Evidence ("M.C.R.E.") 301 addresses the privilege against self-incrimination that applies in military commission proceeding. Although a defendant before a commission is privileged from testifying against himself, the discussion section of the rule directs that if the defendant offers his own prior hearsay statements but does not testify at the proceeding, the military judge "shall instruct" the members of the commission that they may consider the fact that the accused chose not to be cross-examined on the hearsay statements, and that his statements are not sworn testimony. The proposed rule change would eliminate the requirement of this instruction and leave the issue of instructions to the discretion of the military judge. M.C.R.E. 301 would read (deletions are crossed through):

Rule 301. Privilege concerning compulsory self-incrimination

* * * * *

(e) *Waiver by the accused.* When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified.

~~Discussion~~

~~If the accused voluntarily introduces his own prior hearsay statements through the direct examination of a defense witness, but the accused exercises his right not to testify himself at the proceeding, the military judge shall instruct the members prior to the beginning of their deliberations: "The accused has the absolute right to testify as a witness or to choose not to testify in this proceeding. That the accused exercised (his)(her) right not to testify should not be held against (him)(her). However, in this case, the accused has voluntarily offered his prior statements as part of (his)(her) defense by eliciting those statements through other defense witnesses. At the same time, the accused, by electing not to testify in the proceeding, has prevented the Government from subjecting those statements to cross-examination. In evaluating the weight to be accorded to the accused's hearsay statements, you may consider the fact that the~~

~~accused chose not to be cross-examined on those statements and that those statements were not sworn testimony."~~

3. *Remove the distinction between pre- and post-Detainee Treatment Act statements analyzed for coercion.*

Under M.C.R.E. 304(c), the admissibility of statements allegedly obtained through coercion depends upon satisfaction of certain criteria, which differ depending on whether the statements were obtained before or after December 30, 2005, the date of enactment of the Detainee Treatment Act ("DTA"). M.C.R.E. 304(c) provides that a judge may admit an allegedly coerced statement made ***before*** the effective date of the Detainee Treatment Act only if the military judge finds that the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence. By contrast, a military judge may admit a statement made ***after*** the effective date of the Detainee Treatment Act only if he or she finds that the statement is reliable and sufficiently probative, that the interests of justice would best be served by admission of the statement into evidence, *and* that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment.

The proposed rule change would eliminate the difference in the criteria for the admissibility of statements made before and after December 30, 2005. As amended, M.C.R.E. 304(c) would provide that in *all* cases where the degree of coercion used to obtain a statement is disputed, a military judge may admit the statement only if he or she finds that it was not obtained using interrogation methods that constitute cruel, inhuman, or degrading treatment (and if the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence).

The applicable portions of M.C.R.E 304(c) would read as follows (deletions are crossed through):

Rule 304. Confessions, admissions, and other statements

(a) *General rules.*

* * * * *

(b) *Definitions.*

* * * * *

(c) *Statements allegedly produced by coercion.* When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted if ~~in accordance with this section~~.

(1) ~~As to statements obtained before December 30, 2005, the~~

~~military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.~~

~~(2) As to statements obtained on or after December 30, 2005, t~~ the military judge ~~may admit the statement only if the military judge~~ finds that (i) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
(ii) the interests of justice would best be served by admission of the statement into evidence; and (iii) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109-148 (2005) (codified at 42 U.S.C. 2000dd(d)

4. *Provide for a right of individual military counsel, permitting a right to counsel of choice within the office of the Chief Defense Counsel*

Rule for Military Commissions 506 establishes the right of the accused to be represented by civilian counsel, if provided at no cost to the government, and detailed defense counsel. However, the rules currently do not provide for a right of "individual military counsel" ("IMC")—military counsel of the defendant's selection—as provided in the rules for courts-martial (Rule for Courts-Martial 506). An accused before a military commission who desires to request a military defense counsel other than the one detailed to him has no basis in the existing rules for the request. The proposed rule would permit the accused to make such a request, but to accommodate the unique nature of commissions, the group of officers available to act as IMC would be limited to those officers already detailed to the Office of Military Commissions.

Rule for Military Commissions 506, in pertinent part and as rewritten, would be as follows (the areas underlined would be added):

Rule 506. Accused's rights to counsel

(a) *In general.* The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and <u>by either</u> the defense counsel detailed <u>or by military counsel of the accused's own selection, if reasonably available.</u> The accused is not entitled to be represented by more than one military counsel.

Discussion

See R.M.C. 502(d)(3) for determining qualifications for civilian defense counsel. See R.M.C. 502(d)(6) and 505(d)(2) concerning the duties and substitution of defense counsel. These rules and this Manual do not prohibit participation on the defense team by consultants not expressly

covered by section (d) of this rule, as provided in such regulations as the Secretary of Defense may prescribe, subject to the requirements of Mil. Comm. R. Evid. 505.

(b) Individual Military Counsel

(1) Reasonably available. Counsel are not reasonably available to serve as individual military counsel unless detailed to the Office of Military Commissions to perform defense counsel duties when the request is received by the Office.

(2) Procedure. Subject to this section, the Secretary may prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for individual military counsel shall be made by the accused or the detailed defense counsel with notice to the trial counsel. If the requested person is not reasonably available under this rule, the Chief Defense Counsel shall deny the request and notify the accused. If the requested counsel is not among those listed as not reasonably available in this rule, the Chief Defense Counsel shall make an administrative determination whether the requested person is reasonably available. This determination is a matter within the sole discretion of that authority.

5. *Reverse the burden of proof regarding hearsay statements from a requirement that the opponent establish unreliability to a requirement that the proponent establish reliability.*

Currently, M.C.R.E. 803 requires a person opposing the admissibility of a hearsay statement to bear the burden of establishing that the statement is unreliable. The proposed rule change would shift the burden to require the proponent of hearsay evidence to establish its reliability, as is generally the norm in U.S. courts and as provided in the rules of evidence governing courts-martial. The change would also eliminate an apparent discrepancy between the rule text and the discussion, which states that the proponent of a statement "still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403." While hearsay admissibility remains much broader than in domestic courts, the expansive admissibility standard would be consistent with international standards, such as those employed in international criminal tribunals.

As currently drafted, Military Commission Rule of Evidence 803 provides in pertinent part:

* * * * *

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted if the party opposing the admission of the evidence demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances.

Discussion

The M.C.A. recognizes that hearsay evidence shall be admitted on the same terms as other evidence because many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. Because hearsay is admissible on the same terms as other evidence, the proponent still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403.

As modified, the rule would read:

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted unless the proponent of the evidence demonstrates by a preponderance of the evidence that the evidence is reliable under the totality of the circumstances.

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 15 2009

The Honorable Carl Levin
Chairman, Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with section 949a(d) of the Military Commissions Act of 2006 ("MCA"), attached please find the proposed modifications to procedures for military commissions under the MCA. As required by the MCA, I have consulted with the Attorney General prior to prescribing these procedures and rules for cases triable by military commission.

cc:
The Honorable John McCain
Ranking Member

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 15 2008

The Honorable Ike Skelton
Chairman, Committee on Armed Services
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In accordance with section 949a(d) of the Military Commissions Act of 2006 ("MCA"), attached please find the proposed modifications to procedures for military commissions under the MCA. As required by the MCA, I have consulted with the Attorney General prior to prescribing these procedures and rules for cases triable by military commission.

cc:
The Honorable John M. McHugh
Ranking Member

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
	)	
v.	)	**Prosecution Proposed Findings of Fact, Conclusions of Law and Order**
	)	
	)	
	)	
	)	
KHALID SHEIKH MOHAMMED,	)	
WALID MUHAMMAD SALIH MUBARAK	)	
BIN ATTASH,	)	
RAMZI BINALSHIBH,	)	
ALI ABDUL AZIZ ALI,	)	
MUSTAFA AHMED ADAM AL HAWSAWI	)	
	)	**15 May 2009**

1. On January 22, 2009, the President issued Executive Order 13493, establishing a Special Interagency Task Force on Detainee Disposition ("Detention Policy Task Force" or "Task Force") "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice."

2. The Task Force has been directed to provide a report to the President, through the Assistant to the President for National Security Affairs and Counsel to the President, by 21 July 2009.

3. The President ordered the Secretary of Defense to take action to halt all commission proceedings while the Task Force review took place. The Secretary of Defense directed the Chief Prosecutor of the Office of Military Commissions to seek 120-day continuance in any case that had been referred to military commission in order to provide the Administration sufficient time to conduct the review. In January of 2009, pursuant to a Prosecution motion to continue (P-001), this commission granted a continuance until 20 May 2009.

4. After reviewing the briefs of the parties, and the entire record, the Military Commission finds the following facts:

a. The Task Force review is not yet complete, but significant progress has been made. The President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo.

b. Pursuant to Section 949(d) of Title 10, United States Code, the Secretary of Defense must inform the Committees of the Armed Services of both the House and Senate of proposed

modifications to the procedures in effect for military commissions. The proposed modifications to the procedures cannot take effect for 60 days.

c. As a first step, and as a result of the Detention Policy Task Force's initial work, on 15 May 2009, the Secretary of Defense published and notified Congress of five significant changes to the Manual for Military Commissions. The changes submitted on 15 May 2009 will go into effect on 14 July 2009.

d. Conducting further proceedings in this case during the continued Review and upcoming changes in the rules governing military commissions could result in expending effort and resources to litigate issues that might later be rendered moot or that might need to be re-litigated due to changes in the rules or procedures, or might otherwise produce legal consequences affecting the options available to the Administration in its Review.

3. Based upon the foregoing facts, the Military Commission reaches the following conclusions of law:

a. Continuing the proceedings in this case until 17 September 2009 is in the interests of justice because it will permit the President to make the proposed changes to the rules governing military commissions and it will save this case from conducting proceedings that might be affected by rule changes.

b. A 120-day continuance during the rule change review period is in the interests of both the public and the accused, because it will avoid wasted effort in litigating issues that might be rendered moot or might need to be re-litigated by the outcome of that Review, thereby advancing judicial economy, and preventing legal consequences that might affect the options available to the Administration as part of its Review. Changes in the military commission procedures that could result from a Review of the commissions process might inure to the benefit of the accused

c. The interests of justice served by a 120-day continuance in this case outweigh the best interests of both the public and the accused in a prompt trial.

d. The Prosecution has not requested this continuance for the purpose of obtaining unnecessary delay, or for any other inappropriate reason.

e. The Prosecution's continuance request is for an appropriate period of time in light of the rule changes and the statutorily required review period.

f. This delay should be excluded when determining whether any time period under Rule for Military Commission (R.M.C.) 707(a) has run.

4. Wherefore, it is this __ day of May 2009, by this military commission

Comment [g1]: TC insert date when ready to file

ORDERED:

1. That further proceedings in this military commission are continued until 17 September 2009.

Comment [g2]: This date is based on the date in the Motion

2. During the pendency of this continuance the requirements of previously ruled upon motions are stayed, compliance dates will be readjusted appropriately, and all other proceedings in this case will be halted.

3. That all delay between today and 17 September 2009 shall be excluded when determining whether any time period under R.M.C. 707(a) has run.

Comment [g3]: This date is based on the date in the Motion

So ordered on this ___day of May 2009

Stephen R. Henley
Colonel, USA
Military Judge

DECLARATION OF MATTHEW G. OLSEN

Pursuant to 28 U.S.C. § 1746, I, Matthew G. Olsen, hereby declare:

1. I am the Executive Director of the Guantanamo Review Task Force ("Task Force") and Special Counselor to the Attorney General. I was appointed to these positions by the Attorney General on February 20, 2009. Prior to this appointment, I served as a Deputy Assistant Attorney General in the Department of Justice's National Security Division and, more recently, as Acting Assistant Attorney General for National Security. The statements made herein are based on my personal knowledge and information made available to me in my official capacity.

2. The Task Force was created in accordance with Executive Order 13,492, titled "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities." See Exec. Order No. 13,492, 74 Fed. Reg. 4897 ("Executive Order"). The Executive Order, signed January 22, 2009, directs the closure of the Guantanamo Bay detention facility within one year of the date of the order. Id. § 3. To that end, the Executive Order requires "a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay]" to determine whether each detainee can be transferred or released, prosecuted for criminal conduct, or provided another lawful disposition consistent with "the national security and foreign policy interests of the United States and the interests of justice." Id. at §§ 2(d).

3. Section Four of the Executive Order establishes the framework by which this review is to be conducted. The participants to the review are identified as the Attorney General, who shall coordinate the review, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and any other officers or employees of the United States as determined by the Attorney General, with the concurrence of the head of the department or agency concerned. Id. at §§ 4(b).

4. Pursuant to his responsibility to coordinate the review mandated by the Executive Order, the Attorney General established the Guantanamo Review Task Force in late February 2009. The Task Force's responsibilities include assembling and examining relevant information and making recommendations regarding the proper disposition of each individual currently detained at Guantanamo Bay.

5. Specifically, the Task Force is responsible for making recommendations to determine on a rolling basis and as promptly as possible, with respect to the individuals currently detained at Guantanamo, whether it is possible to transfer or release those individuals consistent with the national security and foreign policy interests of the United States, and if so, whether and how the Secretary of Defense may effect their transfer or release. Further, in the cases of those detainees who are not approved for release or

transfer, the Task Force must make recommendations whether the federal government should seek to prosecute those individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution. Finally, with respect to any individuals currently detained whose disposition is not achieved through transfer, release, or prosecution, the Task Force must make recommendations for other lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.

6. The Task Force consists of members from various agencies, including the Department of Defense, the Department of State, the Department of Justice, the Department of Homeland Security, and various elements of the intelligence community. To date, the Task Force has assembled a staff of approximately 50 persons (excluding administrative staff). They are currently grouped into two types of teams for purposes of conducting the reviews of individual detainees mandated by the President's Executive Order: (1) transfer/release teams, responsible for determining whether detainees should be recommended for transfer or release; and (2) prosecution teams, responsible for determining whether the government should seek to prosecute detainees, including whether it is feasible to prosecute detainees in Article III courts. These teams prepare written recommendations in consultation with me, and I submit the recommendations to a Review Panel composed of senior-level officials. The Review Panel members are authorized to decide the disposition of Guantanamo detainees.

7. The work of the Task Force is ongoing. In accordance with the Executive Order, we are making recommendations and decisions on a rolling basis in a manner consistent with certain priorities we have identified since late February. These priorities include detainees subject to court orders from habeas litigation, diplomatic efforts, and detainees facing charges in the military commissions. No final decisions have yet been made whether to continue to prosecute detainees currently charged in the military commission system before the commissions or whether to prosecute these individuals in Article III courts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 14, 2009.

Matthew G. Olsen

DECLARATION OF
MR. J. BRADFORD WIEGMANN AND COL MARK S. MARTINS

Pursuant to 28 U.S.C. § 1746, we, J. Bradford Wiegmann and Mark S. Martins, hereby declare:

1. On January 22, 2009, the President issued Executive Order 13493, establishing a Special Interagency Task Force on Detainee Disposition ("Detention Policy Task Force" or "Task Force") "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice."

2. The Detention Policy Task Force is co-chaired by the Attorney General and the Secretary of Defense, or their designees, and includes the Secretaries of State and Homeland Security, the Director of National Intelligence, the Director of the Central Intelligence Agency, and the Chairman of the Joint Chiefs of Staff, or their designees.

3. Mr. J. Bradford Wiegmann is a career attorney at the United States Department of Justice, and currently serves as the Principal Deputy and Chief of Staff in the National Security Division. He has also been designated by the Attorney General as Co-Chair of the Detention Policy Task Force.

4. Colonel Mark S. Martins is judge advocate on active duty in the United States Army, assigned as Chief of the International and Operational Law Division of the Office of the Judge Advocate General of the Army. He has also been selected by the Secretary of Defense and the Attorney General to serve as member and Executive Secretary of the Detention Policy Task Force.

5. The Task Force has been directed to provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, by July 21, 2009.

6. The Task Force has assembled a staff, which Mr. Wiegmann and Colonel Martins jointly lead and supervise, of 18 U.S. Government employees, consisting of legal and operational personnel from the relevant national security agencies with expertise in all matters pertaining to its work ("Task Force Staff").

7. The Task Force has established an office at the Department of Justice and has formally requested detailed information from the relevant U.S. Government agencies in a number of areas germane to its work, including information relevant to an assessment of the terrorist threat, basic data on detainees currently or previously held by the United States, and information on existing authorities, practices, and policies with respect to the apprehension and detention of suspected terrorists.

8. The Task Force has met seven times, has developed a detailed plan to accomplish its mission, and is hard at work on the issues it is charged with addressing. Six interagency subgroups of the Task Force meet at least weekly with the Task Force Staff to address more than 20 discrete, but closely interrelated, issues. Formal liaison relationships have been established with the companion task forces established under Executive Orders 13491 and 13492.

9. In addition, the Task Force has begun a series of consultations with Congress and Congressional staff, and with diverse stakeholders and experts within and beyond the Executive Branch, in order to gain the benefit of those who have worked with and studied the complex national security, foreign policy, and legal issues associated with the Task Force's comprehensive mandate.

10. The Task Force review is not yet complete, but significant progress has been made. We have been advised that the President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo and others who may be apprehended in the future.

11. As a first step, and as a result of the Detention Policy Task Force's initial work, on 13 May 2009 the Secretary of Defense published and notified Congress of five significant proposed changes to the Manual for Military Commissions, including rules that would exclude all statements obtained by the use of cruel, inhuman or degrading treatment, impose additional conditions on the use of hearsay, and provide the accused greater latitude in the selection of counsel. As required by law, however, proposed modifications to the procedures in effect in military commissions cannot take effect for 60 days from 13 May.

12. As directed by the President, we plan to take further steps to improve military commissions as part of a broader justice system that best protects U.S. national security and foreign policy interests while also serving the interests of justice. These steps will include working with the Congress on legislation to reform our military commissions system to better serve those purposes.

13. We have been advised that the Administration will shortly be proposing legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, not only to make the five rule changes noted above statutory, but also to make other significant changes to the commissions, including among others revising the rules governing classified evidence, further revising the rules regarding the admissibility of hearsay evidence, and adjusting the class of individuals subject to the jurisdiction of the commissions.

14. We anticipate that these changes will nevertheless permit cases pending before commissions to proceed, though no decisions have yet been made as to which specific detainees will continue to be prosecuted before commissions, whether they might be

prosecuted in Article III courts, or whether some alternative disposition of the detainees might be recommended.

Each of us declares under penalty of perjury that the foregoing is true and correct. Executed on 13 May 2009.

J. BRADFORD WIEGMANN

MARK S. MARTINS

UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**Defense Response to P-010 (Government Request for Continuance)** **Ali Abdul-Aziz Ali** 9 June 2009

1. **Relief Sought:** Mr. Ali requests that the Military Judge deny the prosecution's request for an additional 120-day continuance, move forward with his case and rule on the outstanding motions filed over the last four months.

2. **Timeliness.** In D-112, Mr. Ali set forth the on-going problems that the *pro se* defendants are having gaining access to legal materials necessary for their defense. The *pro se* defendants assert that the Joint Task Force-Guantanamo Staff Judge Advocate (JTF-SJA) and his Deputy are interfering with their ability to receive legal materials through standby counsel. The JTF-SJA has established their own standard for determining whether the accused may receive legal materials from their counsel. According to the SJA materials must be legally relevant to the defense before they will be provided. This standard impermissibly violates the attorney-client privilege inserting the SJA into the defendants' relationships with their counsel.[1] On numerous occasions, the SJA has rejected materials despite standby counsels' articulation of their relevance. Further, the SJA and prosecution are in frequent disagreement regarding which of the two is the approval authority for the provision of materials. Out of frustration, the *pro se* accused stopped accepting legal mail.

[1] These accused should be permitted to receive both legal and non-legal materials which do not pose a physical security threat. They have been held in solitary confinement and tortured for several years. The provision of materials which provide intellectual stimulation is both therapeutic and humane.

In light of the Military Judge's continued consideration of the prosecution's continuance request, Mr. Ali respectfully requests that the Military Judge consider Mr. Ali's argument that any further delay does not serve the interests of justice.[2]

3. Overview: Mr. Ali has been in the custody of, or at the direction of, the United States Government since 2003. Close to one year ago, he was arraigned to stand trial before military commission. At the direction of President Obama, the prosecutors sought to continue his case for 120-days while the system of military commissions and the cases of individual detainees were reviewed. The Review process appears to be another attempt at playing politics with the military commissions. During this continuance, the prosecution has not provided any additional discovery nor has the Military Judge convened any commission's session. In addition, President Obama also ordered a review of the conditions of confinement at Guantanamo Bay. Mr. Ali asserts that this Review failed to accurately capture the conditions of confinement for the "high-value" detainees. Mr. Ali's conditions of confinement directly impact his physical and mental well-being. Given these conditions and the lack of legal resources, Mr. Ali cannot prepare his defense.

The government now seeks another 120-days and attempts to limit the Military Judge's authority during this stay period. Mr. Ali objects to any further delay and requests that this Commission move forward.

4. Facts:

a. In April 2003, Mr. Ali was arrested in Pakistan and released to the custody of the United States.

[2] Mr. Ali sent standby counsel detailed arguments to present to the Military Judge in opposition to the continuance. Counsel will file these materials with the Court Security Officer as a classified addendum to this opposition as soon as the appropriate arrangements can be made for its delivery and receipt.

b. Mr. Ali was held in a secret CIA "black site" until September 2006 when he was transferred to the custody of the Department of Defense at Guantanamo Bay, Cuba. The Department of Defense designated the detainees held in CIA black sites as "high value" detainees. Mr. Ali was transferred with twelve other "high value" detainees.

c. On 5 June 2008, Mr. Ali was arraigned. Since that date, the Commission has held several motions sessions, including a session from 22-24 September 2008. At this session, the prosecution provided the Military Judge with an update regarding the discovery process. The prosecution represented that it intended to have the remaining discovery materials for the defense within four to five weeks. The prosecution indicated that these materials totaled between 5-7,000 pages. The previous Military Judge advised that this case could not proceed much further until these materials were turned over.

d. In November 2008, the accused filed a motion seeking to withdraw from the motions previously filed on their behalf by standby counsel and requesting a hearing for the purposes of pleading guilty.

e. On 8 December 2008, the Military Judge addressed the *pro se* motion and allowed the *pro se* accused to withdraw from the previously filed motions. The Military Judge did not accept pleas from the accused at that time; rather, he requested briefing regarding whether the Military Commissions Act, as drafted, permitted an accused to plead to a capital offense. The Military Judge has not ruled on this issue or advised the accused regarding the impact of a guilty plea under the MCA as currently drafted.

f. On 21 January 2009, the prosecution requested a 120-day continuance in the case in light of President Obama's decision to review the use of military commissions and the individual files of each detainee confined at Guantanamo Bay. The Judge granted the continuance request. Although there have been no sessions during the continuance period, the *pro se* accused have filed several motions.

g. On 22 January 2009, the President issued his Executive Order on the Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities. A Special Department of Defense Team undertook a review of the conditions of confinement. The conclusions and recommendations of this Review were released in an unclassified report. Mr. Ali objected to the Review and through counsel submitted written objections to the Report's characterization of his conditions of confinement and its failure to recommend changes. **Attachment A.** Counsel for Mr. Bin al Shibh also submitted classified and unclassified written objections to the Report. **Attachment B.**

5. <u>Law and Argument:</u>

Mr. Ali has waited over five years for his day in court. He is ready to proceed with his case without further delay. The previous delay period prejudiced the defense in several respects. First, the prosecution did not provide any additional discovery during

this period; handicapping Mr. Ali's preparation of his defense. Second, Mr. Ali was denied a forum to resolve issues relating to discovery. Finally, Mr. Ali has an interest in the prompt, just resolution of his case, which he has been denied. Mr. Ali believes that the delays are not in the interests of justice but rather in the interests of political expediency. There has been no change in his conditions of confinement which have now been portrayed as consistent with the Common Article 3 of the Geneva Conventions. Under these conditions, it is his opinion that the Commissions should move forward without further delay.

6. **Request for Oral Argument:** Mr. Ali requests that the Military Judge deny the prosecution any additional continuance and address the other pending motions as soon as possible.

7. **Attachments**.

A. Memorandum from Standby Counsel for Mr. Ali to Department of Justice Review Team Regarding Conditions of Confinement. (Unclassified)

B. Memorandum from Counsel for Mr. Bin al Shibh to Department of Justice Review Team Regarding Conditions of Confinement. (Unclassified)

C. Classified Addendum Delivered Under Separate Cover. (TS/SCI)

DATED this 9th day of June, 2009.

Respectfully submitted,

BY: /s/
Ali Abdul-Aziz Ali, *Pro Se*

Attachment A

17 March 2009

MEMORANDUM THRU Karen Hecker, Associate Deputy General Counsel, Department of Defense, Office of General Counsel

FOR Department of Defense Review Team on Detainee Conditions of Confinement

FROM Major Amy S. Fitzgibbons, Defense Counsel, Office of Military Commissions

1. As military defense counsel, I have extensive contact with my detainee clients and travel to the detention facility at Guantanamo Bay approximately twice a month. I represent Noor Uthman Muhammed (ISN 707) and serve as standby counsel for Ali Abdul-Aziz Ali (ISN 10018). Noor is confined in Camp 4 (communal living) while Mr. Ali is confined in Camp 7. Given the marked difference in their treatment, I will address Noor's case through separate written submission.

2. As a preliminary matter, I have reviewed the unclassified materials submitted by the defense team for Ramzi bin al Shibh. I adopt and concur with the objections noted in their letter and will not duplicate their points. It is important to note that they are the only defense team that has been provided access to Camp 7. I cannot speak directly to the conditions there, however, I have observed their deleterious impact on his mental health and consequent ability to communicate and work with his attorneys.

3. Both Mr. Ali and counsel are in possession of classified material which we believe is relevant to the Review Team's inquiry. The Review Team failed to solicit information from defense teams regarding the conditions of confinement, despite their particularized knowledge of these conditions and their impact upon the detainee clients. Counsel were not given adequate time and opportunity to confer with Mr. Ali to collect and present such materials to the Review Team. Absent these materials, the Review Team's assessment is at best incomplete. In light of the responses received by individual defense teams, counsel for Mr. Ali recommend that the Review be re-opened to consider defense team input.

Mr. Ali's Current Detention Must be Viewed in the Context of his Apprehension and Treatment in CIA Custody.

4. The Walsh Report was commissioned to review the conditions of confinement at Guantanamo Bay Naval Base, to its compliance with Common Article 3 of the Geneva Convention and other applicable laws. The Review is fundamentally flawed in significant respects. Most notably, the Review ignores the conditions and impact of prior detention, particularly with respect to the High Value Detainees. This detention, which did not comport

with domestic and international law, including Common Article 3, resulted in significant damage to these individuals. The Review of their current conditions must be placed in this context.

5. Mr. Ali was apprehended in Karachi, Pakistan in March 2003. From March 2003 through September 2006, the United States held Mr. Ali incommunicado in secret CIA black sites for purposes of interrogating him.[1] The locations of those sites and the methods of interrogation implemented there have been classified at the highest level. For over three years, he was held in complete isolation and in uncertainty as to fate. The use of mental health professionals in these interrogations has been documented in unclassified press accounts. *See,* Declaration Katherine Newell, note 12. Similarly, the methods of interrogation used including sexual humiliation, the use of stress positions for prolonged periods of time, physical assaults, extreme sleep deprivation and waterboarding have been condemned by human rights groups as inhumane and in contradiction to Common Article 3. *See,* Declaration of Katherine Newell at notes 29 and 37.

The Review's Conclusions with Respect to Detainee Access to Counsel Fail to Address the Impact of CIA Detention and the Government's Decision to Withhold Access to Counsel for Five Years in the Case of Mr. Ali.

6. Mr. Ali was transferred from CIA custody to Guantanamo Bay Naval Base in September 2006. Since that time, he has been detained at Camp 7; the detention facility's most restrictive Camp. The Government has designated all of Mr. Ali and the other High Value Detainees' communications as presumptively classified, which frustrates his ability to consult with anyone outside the U.S. Government, particularly counsel. Despite his repeated requests, Mr. Ali was not granted access to an attorney until April 2008, at which time, he met with military attorneys from the Office of the Chief Defense Counsel, Office of Military Commissions. Prior to April 2008, Mr. Ali attempted to secure the assistance of civilian attorneys to challenge his detention and the conditions of his confinement through a habeas action. Habeas counsel were not granted clearances in a timely fashion. Consequently, their first visit to the island is scheduled for next week (26 March 2009).

7. With respect to the High Value Detainees, counsels' ability to meet and communicate with them was significantly limited by Government imposed security restrictions and resource limitations. The Government required that all members of the legal team possess the requisite security clearances, which prevented counsel from consulting with experienced counsel and mental health professionals. The visitation slots are limited to three amongst Commissions and habeas counsel. At the outset, counsel routinely "donated" their visitation slots to other attorneys as a professional courtesy but at the cost of meeting with their individual clients. Attorneys are

[1] The Declaration of Katherine Newell is attached to this memorandum. The Declaration was submitted to the Commission in the case of *U.S. v. Mohammed, et. al.* It provides a summary of the available open source information concerning the detention and interrogation of "high value detainees" such as Mr. Ali.

not permitted to meet with the High Value Detainees at Camp 7. Consequently, Mr. Ali is transported to his meetings, which requires an arduous process of shackling and complete sensory deprivation. Mr. Ali noted in a special request for relief filed with the Commission in the case of *U.S. v. Mohammed et. al,* that the transportation procedures leave him physically and mentally exhausted. Given this toll, Mr. Ali requested that his attorneys limit their visits and communicate with him in writing instead. Unfortunately, it wasn't until two months ago that counsel could communicate with High Value Detainees in an efficient manner via mail. Counsel are still denied phone access to these detainees.

8. The cumulative effect of prolonged isolation, interrogation by agents of the United States and the restrictions placed on counsel have negatively impacted counsels' ability to form attorney-client relationships with their detainee clients. The Review's assessment that conditions comply with domestic and international law ignores seven years of practices by the United States Government which have left Mr. Ali profoundly distrustful and paranoid as to the motives of any U.S citizen. Given these unique circumstances, humane treatment requires more than the *pro forma* provision of counsel as the Review concludes. Mr. Ali and the other High Value Detainees require access to counsel who are qualified to handle a case of this magnitude. Further, given the significant impact of isolation on an individual's mental health, the defense team should include a mental health professional to facilitate communication between Mr. Ali and counsel and the recommendation or provision of appropriate mental health treatment. Mr. Ali cannot reasonably be expected to trust a mental health professional provided by the government given the history of his detention by the United States.

In Light of the Detainees' Treatment in CIA Custody, the Conditions at Camp 7 Do Not Comport with Domestic and International Law, Including Common Article 3.

9. The Review notes that the conditions at Camp 7 amount to humane treatment but strongly recommends increased social interaction to include communal recreation time and group prayer. The defense asserts that these recommendations are required both by Common Article 3 and domestic and international law. These recommendations should be treated as mandatory rather than advisory. I am particularly concerned by the limitations which have been placed on Mr. Ali's ability to engage in social interaction with individuals other than the guard force. Mr. Ali's ability to exercise his religion in a communal manner is a critical component of the needed social interaction. Further, group prayer, particularly is a core tenet of the Islamic practice.

10. The Review fails to address the difference between the opportunities provided for intellectual stimulation in Camp 7 as compared to the rest of the detainee population. Detainees in Camp 7 are not provided with any communal time. The opportunity to participate in programming such as literacy programming is also nonexistent. Recognizing the need to encourage intellectual stimulation, attorneys for Mr. Ali have attempted to provide him with books and software, such as Rosetta Stone to facilitate his understanding of English. The current JTF policy requires that the attorneys make a showing that such materials are related to the

provision of Mr. Ali's defense. Attorneys cannot provide materials that are non-case related which do not pose force protection concerns. The policy is inconsistent with the correctional practice in the United States, which at both the state and federal level allow for the provision of non-legal materials to pre and post trial inmates. The rationale behind the policy is simple; inmates who are intellectually engaged are more likely to be compliant. In Mr. Ali's case, his lengthy incommunicado CIA detention is also a factor which warrants providing him with materials such as books and software that are not case related and do not pose a threat to force protection.

The Review Understates the Delay Involved in Processing Detainee Mail and Fails to Appreciate the Significance of Such Mail to Detainees who were Held Incommunicado for Years.

11. The Review understates the on-going problems associated with the screening and provision of detainee mail, particularly mail addressed to Mr. Ali and others confined at Camp 7. Under the current system, detainees and their relatives are not provided with any guidelines regarding matters which cannot be passed through the mail. Mr. Ali requested any standard operating procedures relating to mail so that he could understand why there are significant delays in the screening of his mail. Mr. Ali also sought to review the SOPs so that he could conform his mail to the guidelines increasing the likelihood that it would be expeditiously processed. The delays in the current detainee mail system are particularly acute with respect to mail passing through the International Committee for the Red Cross (ICRC). Mr. Ali has unapproved ICRC mail dating from May 08. The receipt of mail, particularly family mail from the ICRC, has a significant impact on detainees like Mr. Ali who was held secretly for many years. Mr. Ali has also used the mail in an effort to contact the federal courts and recruit civilian counsel to assist him.

Contrary to the Review's Summary, the Joint Task Force's Current Practice does not Permit Counsel or Mr. Ali with Access to his Medical Records.

12. The Review mischaracterizes the current practice with respect to detainee medical records. The Review summarizes an interview with the Medical Plans Officer which purports to detail the process for the request and release of detainee medical records. The Review further states that confidentiality, security and integrity of medical records are maintained under the current practice. These reassurances are inconsistent with the DOD policy and Mr. Ali's experience in seeking access to his records.

13. The Review Team cites Department of Defense Instruction 2310.08E as requiring the safeguard of detainee medical information. The Review Team also cites, without comment, the "Benkert Memo"; a Department of Defense Memorandum interpreting that instruction which contradicts the comments of the Medical Plans Officer. On May 2, 2008, Joseph Benkert, the Deputy Assistant Secretary of Defense for Global Security Affairs issued a Memorandum

interpreting the Instruction to require that any request for detainee medical records must be routed through the prosecution. The prosecution then makes a request to the JTF for the provision of the detainee's records, which are screened by the prosecution before they are provided to counsel or the detainee himself. In a clarification memorandum, the JTF-GTMO Commander exempted detainee mental health records from disclosure to the prosecution.

14. Mr. Ali first requested his medical records on 19 June 2008. Since that time, counsel and Mr. Ali have repeatedly requested their release. In July 2008, the Military Judge issued an Order directing the release of Mr. Ali's medical records. Both the prosecution and the JTF have ignored the Order. Neither Mr. Ali nor his counsel have been provided the opportunity to review his medical records including his mental health records. Contrary to the Medical Plans Officer's assertions, there is no direct access to detainee medical records.

15. Counsels' need for access to detainee medical records, including mental health records cannot be understated. First, counsel are in the best position to observe symptoms of mental illness and/or recurring physical health problems based on the nature of their relationship with the detainee. Second, it is the role of counsel to advocate for the client, which includes ensuring that their need for medical and mental health care are addressed. Finally, the detainee's medical and mental health relate directly to their ability to communicate with counsel and to assist in the preparation of their defense. Mr. Ali has his own independent interest in reviewing his medical and mental health records. Given his experience, he is understandably distrustful of the medical care provided to him. He is entitled to know and review the diagnoses and treatment recommendations made for him by JTF personnel.

16. The current practice of inserting the prosecutor into the medical record screening process violates the privacy guarantees of United States domestic law. The policy also impairs counsel's ability to review Mr. Ali's treatment to ensure that it is appropriate and humane.

17. On behalf of Mr. Ali, undersigned counsel appreciates your consideration of these materials and requests that the Review consider amending its findings to reflect these concerns. The members of Mr. Ali's defense team would welcome the opportunity to answer any questions that the Review Team, particularly with respect to the impact of the conditions of confinement on their relationship with Mr. Ali. Questions may be directed to Major Amy Fitzgibbons, (703) 696-9251 or amy.fitzgibbons@osd.mil.

Respectfully submitted,

Amy S. Fitzgibbons
MAJ, JA, USAR
Detailed Standby Military Defense Counsel for

Ali Abdul-Aziz Ali

Attachment B

Office of the Chief Defense Counsel
Office of the Military Commissions
1600 Defense Pentagon, Rm. 3B688
Washington DC 20301
Phone: (703) 696-9237
Fax: (703) 588-2036/2047

19 March 2009

MEMORANDUM TO THE DETAINEE TASK FORCE

From: Military Defense Counsel for Mr. Ramzi bin al Shibh (ISN 10013)
To: Department of Defense, Detainee Task Force
Via: Ms. Karen Hecker, Office of the General Counsel

Subj: ADDENDUM TO COUNSEL FOR MR. RAMZI BIN AL SHIBH'S RESPONSE TO DEPARTMENT REVIEW OF CONDITIONS OF CONFINEMENT AT GUANTANAMO BAY

Ref: (a) Memorandum to the Secretary of Defense, Supplement to Counsel for Mr. Ramzi bin al Shibh's Response to Department Review of Conditions of Confinement at Guantanamo Bay, dated 18 March 2009 (Top Secret (Code Word))
(b) Executive Order 12958, as amended, Classified National Security Information
(c) Executive Order, Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities, dated 22 January 2009

Encl: (1) D-103, Defense Request for Special Relief from Protective Orders dated 16 March 2009
(2) D-103, Order, *United States v. Mohammed, et. al*., dated 16 January 2009

1. The purpose of this Memorandum is to provide clarification and to reaffirm in an unclassified document several positions articulated in the classified Supplement Memorandum provided on 18 March, reference (a). The Supplement was submitted upon invitation from Ms. Hecker to provide additional information in response to the review conducted by Admiral Patrick Walsh, U.S. Navy, Vice Chief of Naval Operations, which concluded that detention conditions at Guantanamo Bay are in conformity with Common Article 3 of the Geneva Conventions.

CLASSIFICATION OF RELEVANT INFORMATION

2. As stated in reference (a), we believe that a more expansive inspection and inquiry into Camp 7 is required in order to ensure that it complies with "all applicable laws governing the conditions of confinement," as ordered by the President. The greatest obstacle to this inquiry is the classification level of the prison and all matters related to the "high value" detainees it holds, as evidenced by the fact that the Supplement itself

was required to be classified. Although we appreciate the need to protect the physical security of the facility and personnel, and national security generally, we believe that more transparency in the review of Camp 7 would be of great benefit to the assessment.

3. Per applicable regulations and the enclosed Order of the Military Judge, we marked and handled the Supplement at the classification level of Top Secret (Code Word). We treated it as such based upon previous guidance that all matters relating to our client fall within a specific classified program at the Top Secret level. However, we were also previously informally advised that all matters relating to Camp 7 are classified as Secret. Thus, we respectfully request that the Detainee Task Force forward the document to the appropriate Original Classification Authority for a classification review in accordance with reference (b). Thereafter, we respectfully request that an unclassified version of the document, redacted as required, be fully disseminated to all persons/agencies involved in the review ordered by the President.

JUDICIAL LIMITATIONS ON DISCLOSURE OF RELEVANT INFORMATION

4. As the Supplement was properly marked, handled, and disseminated to persons within the Office of the Secretary of Defense whom we believe have the requisite security clearance and "need to know," it was our original intent to provide *all* information we believe relevant to a review of the conditions at Camp 7. Prior to submission of the Supplement, however, it was necessary for us to seek relief from Protective Orders 3 and 7 in the case of *United States v. Mohammed, et. al*., which require us to submit any document we believe contains classified information only to the Senior Security Advisor, for the Military Commissions for a classification review. *See* Defense Request for Special Relief, D-103. This request was necessary to avoid a lengthy delay due to a classification review, to ensure we met the deadline you provided, and to avoid liability for providing or disseminating classified information to the Office of the Secretary of Defense. Although the Military Judge granted our request for relief from the protective orders, he *sua sponte*, and without a supporting objection from the prosecution, narrowed the scope of information we were able to provide. Specifically, he allowed only for release of "classified information regarding detailed defense counsel's observations of the conditions of detention at Camp 7." *See* Enclosure 2, ¶ 2. The result was that in our submission, we were unable to provide all of the information we believe is relevant to an assessment of whether Camp 7 complies with Common Article 3.

5. It is our belief, based upon our review of applicable case law, academic literature, and consultation with experts that the current conditions of confinement must be assessed in the context of the individual detainee's prior experiences in custody. This view also complies with the order of the President that "[n]o *individual* currently detained at Guantanamo shall be held…except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions." Reference (c), sec. 6 (emphasis added). If the Military Judge did not limit the scope of information we could provide in this supplement, we would have provided information regarding other experiences of Mr. bin al Shibh's, prior to his arrival at Guantanamo in September 2006, and discussed how this information is directly relevant

to the areas under review and the proper assessment of current conditions of confinement. Instead, in our Supplement, we were left to merely highlight where the judge's order limited our ability to present relevant information.

6. We look forward to additional discussion on this matter. Please advise if you have any questions and/or require additional information. We may be reached at: (CDR Lachelier) – (703) 588-0439; lachels@dodgc.osd.mil or (LT Federico) – (703) 696-9237; federir@dodgc.osd.mil.

Very Respectfully Submitted,

By: *Suzanne M. Lachelier*
CDR Suzanne M. Lachelier, JAGC, USN
Detailed Defense Counsel for
Mr. Ramzi bin al Shibh

By: *Richard E.N. Federico*
LT Richard E.N. Federico, JAGC, USN
Detailed Defense Counsel for
Mr. Ramzi bin al Shibh

Office of the Chief Defense Counsel
Office of the Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, D.C. 20301

cc:
General Counsel, Department of Defense
Vice Chief of Naval Operations
Commander, U.S. Southern Command
Judge Advocate General, U.S. Navy
Commander, Joint Task Force - Guantanamo
Chief Defense Counsel, Office of the Military Commissions
Mr. bin al Shibh

Attachment C

Classified Addendum filed Under Cover with Court